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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 300

UNITED STATES OF AMERICA
Petitioner,

-v.-

E. B. HULLEY, et al.,
Respondents.

BRIEF IN OPPOSITION TO WRIT

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PRELIMINARY STATEMENT

The Petitioner, United States, having filed it Brief some 60 days previous to the filing of this Brief in opposition, several cases at the time of the writing of this Brief are pending relating to the subject case and are, therefore, brought to the attention of this Court.

The Petitioner, while it appears that the jurisdictional statement and statutes involved have been correctly presented, has presented their question in such a manner that the Respondents feel that it should be presented in a different light.

I.

QUESTION PRESENTED

Is a mechanic's lien, which by visible commencement of operations accrued prior to the recording of a federal tax lien as construed by State law, superior to a Federal tax lien subsequently recorded?

II.

REASONS FOR DENYING THE WRIT

The Respondents are relying on their property rights as afforded them by the State Statutes of Florida, Sections 84.02 and 84.03, as interpreted by the case of *United States vs. Griffin-Moore Lumber Company, Inc.*, 62 So. 2d 589. The Supreme Court of Florida, per curiam, affirmed the Trial Court of the 6th Judicial Circuit of the State of Florida, in and for Pinellas County, which stated that "the United States of America is not seeking to attach its lien to anything of value which E. B. Hulley diverted into the ownership of this property. Under the existing circumstances, it is the opinion of this Court that the United States should not occupy a position herein more favorable than that occupied by E. B. Hulley . . . ." Mr. Chief Justice Terrell of the Supreme Court of Florida, in the *Griffin-Moore Lumber Company, Inc.*, case, supra, inferred by the language of the Court as follows: "The United States Internal Revenue Code, Section 3672, does not attempt to give the tax liens priority over the materialmen's lien". Indeed, Section 3670 of the Internal Revenue Code of 1939 states that "the amount . . . which being a lien in favor of the United States upon all property or rights to property, whether real or personal, belonging to such person".

Clearly, if E. B. Hulley, in the subject case a contractor, had only the legal title with little or no equity, the United States should not acquire an interest beyond which the contractor is legally entitled. If the contractor, E. B. Hulley, had an interest in funds held in escrow to which he was entitled, certainly the United States should be expected to assert the Federal Lien against that amount. Section 3670, upon which the United States relies, creates no property rights but merely grants to the government whatever property rights the contractor has. This idea was developed in the case of *Aetna Casualty and Surety Company vs. United States,* 4 N.Y. 2d 639, which was decided against the government in the New York Court of Appeals and also presented in *United States vs. Durham Lumber Company,* 257 F 2d 570, 58-2 USTC, par. 9736. This alone, it would seem would be ground enough to deny the writ of certiorari since it is plain that Congress did not intend to assert the Federal Lien against property or properties not actually owned by the taxpayer but owned only in the "technical" sense of ownership. For Congress to do anything to the contrary would result in a grave injustice to the materialman and laborman and deprive him of the benefits of his labor and economic welfare. It is interesting to note that the government in citing the case of *United States vs. New Britain,* 347 U.S. 81, 88, in their Brief, has quoted the Court acknowledging the State's right to decide matters relative to their own State law. While mentioning the case of *United States vs. New Britain,* supra, it is also worth mentioning that Mr. Justice Douglas in his dissenting opinion stated as follows:

> "We said that liens under State law were perfected in the sense that there is nothing more to be done to have an inchoate lien--when the identity of the lienor, the property subject to the lien, and the

amount of the lien are established, then the lienor had an immediate right to enforce his lien 'against the property' The Court apparently holds that under 26 U.S.C. Section 3670, a lien that is specific and inchoate under State law, no matter how diligently enforced, can never prevail against a subsequent Federal Tax Lien short of reducing the lien to final judgment. That is new doctrine not warranted by our decisions and supportable only if the New Britain case were overruled, 100 L. Ed. 871."

The case of *Aquilino vs. United States,* 140 N.Y. 2d 355; case No. 132 (this term), together with the instant case of *United States vs. Hulley,* No. 300, both present questions of the applicability of State or Federal law in determining property a right which is subject to a Federal Tax Lien. While the two cases involved rights of lien claimants under State mechanic's and materialmen's liens, the *Hulley* case is directly contrary to the *Aquilino* case. Apparently, the Respondent's argument to the Court of Appeals of New York was that only Federal law controlled. Although the *Aquilino* and *United States vs. Hulley* cases both involved rights of lien claimants under State mechanic's and materialmen's liens, they are directly contrary in that the Florida Court applied State law whereas the Respondent's argument to the Court of Appeals in that case was that only Federal law controlled.

The most important and significant case, it seems, relative to the rights of the State Courts to apply the State law is the case of *Erie R. R. Co. vs. Tompkins,* 304 U.S. 64. It is now established that this case enters the field of Federal liens. This case decided that the State Property Law was a matter to be determined by the State Courts and, further, that for the Federal

Courts to supervene the State law would be an unconstitutional assumption of powers of the Courts of the United States. The case was first mentioned in the Federal lien litigation in the case of *Commissioner vs. Stern,* 2 L. Ed. 2d 1126. Similarly, the Supreme Court in the case of *United States vs. Bess,* 2 L. Ed. 1135, made the following statement: "Since Section 3670 (1939 Code—now 1954 Code, Section 6321) creates no property rights but merely attaches consequences Federally defined, the rights created under State law, *Fidelity and Deposit Co. vs. New York City Housing Authority,* 241 Federal 2d 142, 144". We must look first to Mr. Bess's right and the policy defined by State law: and, again, it is clear that, as in the instant case of *United States vs. Hulley,* the State definitely has interpreted through its own Courts the matter of property rights as would be expected, and in the present case of *United States vs. Hulley* there are two State Statutes defining the extent of liens on real property, (Section 84.02, 84.03, 6 Florida Statutes annotated).

The case of *United States vs. R. F. Ball Construction Co.,* 355 U.S. 587, was decided in favor of the Federal lien that attached contrary to the surety's interest and there too, the lower Courts apply for local law despite the fact that the Supreme Court decided that the Federal lien superceded the instrument, giving only an inchoate lien which was unperfected at the time the Federal lien attached. However, it is interesting to note that there were four dissents indicating that there is a diversity of opinion as regards the right of the Federal tax liens to supervene the State liens decided under the State property law.

In the case *American National Bank of Jacksonville*, No. 261, October term, 1958, the 5th Circuit held that a tax lien against a husband could not attach to an estate by the entirety. The 5th Circuit held that the State laws of property controlled the cases also similar in many respects to the *Aetna Casualty and Surety Co. vs. United States,* supra, and concerned the same principles as the *Aquilino vs. United States,* No. 132, and the subject case, *United States vs. Hulley* and *Goldstein vs. United States,* 162 Federal Supplement 154, 256, Federal 2d 581, case 215, October term, 1958. There became involved the question of whether the United States can, by a Federal tax lien against the taxpayer, have priority of a lien for attorney's fees in a condemnation case. Although different from the *Aquilino* and *Hulley* cases to some extent there still remains the question of whether or not State property law will be applied as against Federal tax lien. Here, the government successfully contended in the lower Courts that it had a prior right to the funds. However, since the assets of the taxpayer were produced by the services of Mr. Goldstein, it would seem that instead of the taxpayer being penalized that the government is merely out to satisfy the tax lien by property belonging to another and would certainly seem unjustified.

In *Callaway vs. Benton,* 336 U.S. 132, the Supreme Court held that Federal law cannot supervene State law as to property rights; hence, a bankruptcy court was without jurisdiction to compel the sale of a railroad, which was owned by a corporation not subject to the proceedings. This case is certainly in line with the reasoning above given in *Erie R. R. Co. vs. Tompkins,* 304 U.S. 64, and a contrary ruling would be directly in conflict with

the very important decision in the case of *Erie R. R. Co. vs. Tompkins*, 304 U.S. 64, which in fact overruled *Swift vs. Tyson*, 16 Pet 1, 18, 10 L. Ed. 865.

The Respondents bring to the attention of this Court the unusual request instigated by the Petitioner that their petition for a writ of certiorari should be granted and the judgment reversed without oral argument or further Briefs attempting to substantiate their requests by mentioning the disposition of the *Calotta, White Bear,* and *Vorreiter* cases. The Petitioner should be well aware that it is customary to allow oral argument where the petition for certiorari is granted, and almost never is the judgment *reversed* unless there has been the opportunity for oral argument. It would appear that such a disposition of the present case in the light of its importance would be a denial of due process should the Court establish such a precedent.

CONCLUSION

The cases heretofore cited by the Respondents, indicate that the Supreme Court of Florida, by applying the State property law, has decided the present case in accord with numerous applicable decisions of the United States Supreme Court and theretofore already determined by this Court. It is respectfully submitted, therefore, that the petition for a writ of certiorari of the United States should be denied and that the requests of the Petitioner that the writ be granted and judgment reversed without oral argument and further Briefs, be also denied.

Respectfully submitted

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